

## **REMARKS**

In response to the above-identified Office Action (“Action”), Applicants traverse the Examiner’s rejection to the claims and seek reconsideration thereof. Claims 1, 4 and 6-16 are pending in the present application. Claims 1, 4 and 6-16 are rejected. In this response, claims 1, 15 and 16 are amended, no claims are cancelled and claims 17-19 are added.

### **I. Claim Amendments**

Applicants respectfully submit herewith amendments to claims 1, 15 and 16. Claims 17-19 are added. Claim 1 is amended to recite that the composition is in the form of a body lotion and further that it exfoliates the skin in the absence of an alpha-hydroxy acid. Support for the amendments to claim 1 may be found, for example, on page 5, paragraphs [0025] and [0027] of the Application. In particular, this portion of the Application discloses that the composition may have exfoliant properties and further discloses that the composition has a conditioning action. Based upon such a disclosure, one of ordinary skill in the art would understand a composition which is applied to the skin and has conditioning properties as being in the form of a lotion since conditioning is understood in the cosmetic art to refer to substances such as lotions which have emollient properties.

Claim 15 is amended to recite that the composition is rubbed on the skin to exfoliate and promote cell turnover of the skin without the use of alpha-hydroxy acid. Support for the amendments to claim 15 may be found, for example, in paragraphs [0025] and [0027] of the Application.

Claim 16 is amended to include the element of water. Support for the amendment to claim 16 may be found, for example, in paragraph [0014] of the Application.

Claim 17 recites that the composition is in the form of an oil in water emulsion. Support for claim 17 may be found, for example, on page 5, paragraph [0024] of the Application. Claims 18 and 19 recite that the composition is in the form of a lotion. Support for claims 18 and 19 may be found, for example, on page 5, paragraph [0027] as previously discussed.

Applicants respectfully submit the amendments do not add new matter and are supported by the specification. Accordingly, Applicants respectfully request consideration and entry of the amendments to claims 1, 15 and 16 and new claims 17-19.

## **II. Claim Rejections – 35 U.S.C. §112**

In the outstanding Action, claim 16 is rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement. Applicants respectfully traverse the rejections.

In the Action, the Examiner alleges that the composition “consisting of” as recited in claim 16 lacks support from the original disclosure because (1) the examples listed in the disclosure contain ingredients other than those recited in claim 16, (2) the composition presented in paragraph [0014] of the Application contains 2-30% silicone and 60-90% water and (3) the claimed pH of less than 3.0 is a new limitation.

Although Applicants do not agree with the Examiner’s rejections on this basis, Applicants have amended claim 16 to include the element of “60% to 90% water” to expedite prosecution on this case. Applicants believe that claim 16 as amended now includes each of the limitations recited in the exemplary composition presented in paragraph [0014] of the Application as suggested by the Examiner and is therefore in compliance with the written description requirement. The fact that other examples provided in the Application recite additional ingredients is irrelevant for at least the reason that the claim is supported by the exemplary composition provided in paragraph [0014] of the Application. Applicants respectfully note that claim 16 reciting the element of “consisting of” was added per the Examiner’s suggestion in the Examiner’s Interview summarized in the Response to Final Office Action mailed April 22, 2008. Moreover, Applicants have carefully reviewed the rules set forth in MPEP § 2111.03 regarding the use of transitional phrases such as “consisting of” and are unable to discern any portion of the discussion in this section suggesting that a claim reciting “consisting of” must include each of the elements of all the examples presented in the Application. Accordingly, Applicants request that if the Examiner maintains the rejection on this

basis, the Examiner identify the rule requiring that a claim reciting “consisting of” must include each and every ingredient and amount listed in each of the exemplary compositions.

Moreover, the claimed pH range of less than 3 is supported by the Application. In particular, paragraph [0012] of the Application recites the following:

In one embodiment, there is disclosed a composition including water, a glycol, a silicone, a quaternium, and a polymer viscosity modulator. In one embodiment, the composition has a pH of less than about 3.5. In another embodiment, the composition has a pH in a range of about 2.8 to about 3.2. In another embodiment, the composition has a pH of about 3.

Applicants respectfully submit the explicit disclosure in the Application of a composition have a pH range of about 3 and exemplary ranges less than 3 (e.g, about 2.8 to about 3.2) provides explicit support for the range recited in claim 16.

Accordingly, for at least the foregoing reasons, claim 16 is in compliance with 35 U.S.C. §112, first paragraph. Applicants respectfully request reconsideration and withdrawal of the rejection of claim 16 on this basis.

### **III. Claim Rejections – 35 U.S.C. §103**

A. In the outstanding Action, claims 1, 4, 6, 7 and 13 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,818,523 issued to Clarke et al. (“Clarke”). Applicants respectfully traverse the rejections.

To establish a *prima facie* case of obviousness, the Examiner must set forth “some articulated reasoning with some rational underpinning to support the conclusion of obviousness.” See KSR International Co. v. Teleflex Inc., 82 USPQ2d 1385, 1396 (2007). In combining prior art elements to render the claimed combination of elements obvious, the Examiner must show that the results would have been predictable to one of ordinary skill in the art. See Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103, Section III(D), issued by the U.S. Patent and Trademark Office on October 10, 2007.

In regard to independent claim 1, Applicants respectfully submit Clarke fails to disclose or render predictable a composition including each of the elements of “a silicone, wherein the amount of silicone present in the composition is 4% to 30% by weight; a quaternium, wherein the amount of quaternium present in the composition is 3% to 20% by weight; a polymer viscosity modulator, wherein the amount of polymer viscosity modulator present in the composition is 0.2% to 1% by weight; and wherein the composition is in the form of a body lotion that is suitable for being left on the skin such that it exfoliates the skin in the absence of an alpha-hydroxy acid and has a pH in a range of 2.8 to 3.2” as recited in amended claim 1.

Rather, Clarke discloses an easily removable hair rinse conditioner, not an exfoliating lotion suitable for being left on the skin. See Clarke, Abstract.

Moreover, as recognized by the Examiner, Clarke discloses in Example 2 and col. 9, lines 20-25 that the conditioner includes, for example, 0.5% propylene glycol, about 0.5-1.5% silicones or 1% cyclomethicone, 1-2.5% quaternium or 1% dodecyl trimethyl ammonium chloride and hydroxyethylcellulose. Thus, Clarke fails to disclose an amount of each component within, overlapping or even close to the claimed ranges. The Examiner suggests, however, that one of ordinary skill in the art would understand to modify the ranges disclosed in Clarke to arrive at the claimed ranges.

As previously discussed, Clarke discloses a hair rinse conditioner. In contrast, the composition of claim 1 is a composition in the form of a lotion which exfoliates the skin. The properties desired of a hair rinse conditioner and an exfoliating skin composition are different. In particular, a hair rinse conditioner is used to condition hair, which is composed of non-living keratinised protein fibers. In contrast, skin is a living tissue with living cells. One of ordinary skill in the art would understand that the desired ingredients and ingredient amounts for application to non-living matter such as hair are different than that which is used for living skin tissue. Accordingly, for at least the reason that there is no reason to exfoliate hair, one of ordinary skill in the art would not understand, in the absence of Applicants’ disclosure, to modify the ingredient ranges of Clarke to arrive at a skin exfoliating composition having the ingredient ranges of claim 1.

Applicants further disagree with the Examiner's indication that Clarke's teaching of "suitable acids which may be used when needed are citric acid and the like" (emphasis added) suggests achieving the claimed pH ranges using acids other than alpha-hydroxy acid (AHA). In particular, if the foregoing disclosure suggests the use of acids other than citric acid, it would be acids "like" citric acid, i.e. other AHAs.

Finally, Clarke fails to disclose a composition "suitable for being left on the skin" as further recited in claim 1. Rather, as previously discussed, Clarke discloses an easily removable hair rinse conditioner. Hair rinse conditioners are not left on the hair, much less the user's skin. Applicants respectfully note that the element of "suitable for being left on the skin" provides a structural difference between the claimed composition and that of the prior art and should therefore be given patentable weight during examination. In particular, in contrast to conditioners or compositions which include phosphoric acid (see Flick<sub>1</sub>) and therefore cannot be left on the skin, the claimed composition includes ingredients which achieve a low pH composition which is suitable for being left on the skin without irritating the skin. Accordingly, the element of "suitable for being left on the skin" provides a patentable distinction between the claimed composition and the prior art.

Thus, for at least the foregoing reasons, Clarke fails to disclose or render predictable each and every element of claim 1. Since each of the elements of claim 1 are not obvious in view of the cited prior art, a *prima facie* case of obviousness may not be established. Applicants respectfully request reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §103 over Clarke.

In regard to claims 4, 6, 7 and 13, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons that claim 1 is not obvious over Clarke, claims 4, 6, 7 and 13 are further not obvious over the cited prior art reference. Applicants respectfully request reconsideration and withdrawal of the rejection of claims 4, 6, 7 and 13 under 35 U.S.C. §103 over Clarke.

**B.** In the outstanding Action, claims 1, 4, 6-9 and 11-15 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,709,773 issued to Espinoza ("Espinoza") in

view of *Cosmetic and Toiletry Formulations* by Flick (“Flick<sub>1</sub>”). Applicants respectfully traverse the rejections.

In regard to independent claims 1 and 15, Applicants respectfully submit Espinoza and Flick<sub>1</sub> fail to disclose or render predictable at least the elements of a composition “wherein the composition is in the form of a body lotion that is suitable for being left on the skin such that it exfoliates the skin in the absence of an alpha-hydroxy acid and has a pH in a range of 2.8 to 3.2” as recited in claim 1 and “rubbing the skin to distribute the composition over the skin to exfoliate and promote cell turnover of the skin without the use of alpha-hydroxy acid” as recited in claim 15.

Nowhere within Espinoza or Flick<sub>1</sub> is a composition which exfoliates and causes cell turnover of the skin disclosed. Rather, Espinoza generally discloses a multivesicular emulsion drug delivery cream composition. See Espinoza, Abstract. The cream composition may include an alpha-hydroxy acid (AHA). See Espinoza, col. 7, “AHA Cream w/Sunscreen.” Flick<sub>1</sub> discloses a shower gel in which the pH is adjusted with phosphoric or citric acid.

Moreover, although Espinoza discloses that hydroxyethylcellulose may be a suitable thickening agent, Applicants are unable to discern any portion of the sample formulations (i.e. sunscreen lotion and self tanning cream) relied upon by the Examiner to disclose the elements of claims 1 and 15 listing a thickening agent much less a particular amount of thickening agent. Thus, Espinoza further fails to disclose a composition including 0.2% to 1% by weight of a polymer viscosity modulator.

Espinoza may further not be relied upon as alleged by the Examiner to disclose the claimed AHA free composition of claims 1 and 15 at the claimed pH ranges. In particular, the sentence ending in col. 5, lines 1-2 (which begins on line 64 of col. 4) of Espinoza which the Examiner alleges implies the claimed pH ranges are obvious, recites the following:

“A particularly preferred thickening agent for use in the formulations of the present invention, especially in the case of gels/serums, in the nonionic polymer hydroxyethylcellulose, which is compatible with strontium nitrate and is stable at pH values around 3.”

Applicants are unable to discern, however, where within the sample formulations for the sunscreen lotion and self-tanning cream, relied upon by the Examiner, the ingredient hydroxyethylcellulose is disclosed. Accordingly, this portion of Espinoza may not be relied upon to disclose that the pH of the sunscreen lotion and self tanning cream are within the claimed pH ranges of claims 1 and 15.

Flick<sub>1</sub> may further not be relied upon to cure the deficiencies of Espinoza with respect to the claimed AHA free composition having the claimed pH ranges. Flick<sub>1</sub> discloses the use of either citric acid or phosphoric acid to modify the pH of a shower gel. The Examiner therefore alleges Flick<sub>1</sub> suggests the use of an acid other than an AHA (e.g. phosphoric acid) to adjust the pH to the claimed range. A composition including phosphoric acid, however, is not suitable for being left on the skin as claimed. Although phosphoric acid may be used to adjust the pH of a shower gel such as that disclosed in Flick<sub>1</sub> which is rinsed off the skin, one of ordinary skill in the art would not understand such an acid to be suitable for a composition which is left on the skin as claimed. Thus one of ordinary skill in the art would not understand any reason to modify Espinoza in view of Flick<sub>1</sub> to achieve the claimed combination of elements.

Thus, for at least the foregoing reasons, Espinoza and Flick<sub>1</sub> fail to disclose or render predictable each and every element of claims 1 and 15. Since each of the elements of claims 1 and 15 are not obvious in view of the cited prior art, a *prima facie* case of obviousness may not be established. Applicants respectfully request reconsideration and withdrawal of the rejection of claims 1 and 15 under 35 U.S.C. §103 over Espinoza and Flick<sub>1</sub>.

In regard to claims 4, 6-9 and 11-14, these claims depend from claim 1 or claim 15 and incorporate the limitations thereof. Thus, for at least the reasons that claims 1 and 15 are not obvious over Espinoza and Flick<sub>1</sub>, claims 4, 6-9 and 11-14 are further not obvious over the cited prior art references. Applicants respectfully request reconsideration and withdrawal of the rejection of claims 4, 6-9 and 11-14 under 35 U.S.C. §103 over Espinoza and Flick<sub>1</sub>.

C. In the outstanding Action, claim 10 is rejected under 35 U.S.C. §103(a) as being unpatentable over Espinoza and Flick<sub>1</sub> as applied to claims 1, 4, 6-9 and 13-15, and further in view of *Cosmetics Additives* by Flick (“Flick<sub>2</sub>”). Applicants respectfully traverse the rejection.

Claim 10 depends from claim 1 and incorporates the limitations thereof. For at least the reasons previously discussed, Espinoza and Flick<sub>1</sub> fail to disclose or render predictable at least the element of “a silicone, wherein the amount of silicone present in the composition is 4% to 30% by weight; a quaternium, wherein the amount of quaternium present in the composition is 3% to 20% by weight; a polymer viscosity modulator, wherein the amount of polymer viscosity modulator present in the composition is 0.2% to 1% by weight; and wherein the composition is in the form of a body lotion that is suitable for being left on the skin such that it exfoliates the skin in the absence of an alpha-hydroxy acid and has a pH in a range of 2.8 to 3.2” as incorporated into claim 10 from claim 1. The Examiner has further not pointed to, and Applicants are unable to discern, a portion of Flick<sub>2</sub> curing the deficiencies of Espinoza and Flick<sub>1</sub> with respect to at least these elements. Thus, for at least the foregoing reasons, claim 10 is not *prima facie* obvious over Espinoza, Flick<sub>1</sub> and Flick<sub>2</sub>. Applicants respectfully request reconsideration and withdrawal of the rejection of claim 10 under 35 U.S.C. §103 in view of Espinoza, Flick<sub>1</sub> and Flick<sub>2</sub>.

#### **IV. New Claims 17-19**

Claims 17-19 depend from claims 16 or 15 and incorporate the limitations thereof. Thus, for at least the reasons that claims 16 and 15 are patentable over the cited prior art references as previously discussed, claims 17-19 are further patentable. Claim 17 recites the additional element of wherein the composition is in the form of an oil in water emulsion. Applicants are further unable to discern a portion of the cited prior art references disclosing this element. Applicants respectfully request consideration and allowance of claims 17-19 at the Examiner’s earliest convenience.



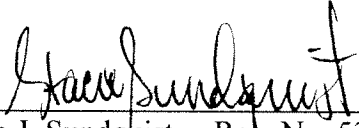
### CONCLUSION

In view of the foregoing, it is believed that all claims now pending, namely claims 1, 4 and 6-19, are now in condition for allowance and such action is earnestly solicited at the earliest possible date. If there are any additional fees due in connection with the filing of this response, please charge those fees to our Deposit Account No. 02-2666. Questions regarding this matter should be directed to the undersigned at (310) 207-3800.

Respectfully submitted,

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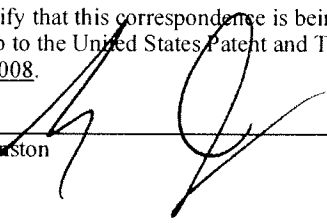
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#### **CERTIFICATE OF TRANSMISSION**

I hereby certify that this correspondence is being submitted electronically via EFS Web to the United States Patent and Trademark Office on October 1, 2008.

  
Suzanne Johnston